



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-1279

SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT & POWER DISTRICT,

Appellant,

vs.

DEPARTMENT OF PROPERTY VALUATION OF
THE STATE OF ARIZONA,

Appellee.

MOTION TO DISMISS AND BRIEF
IN SUPPORT OF MOTION

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The Appellees move the Court to
dismiss the appeal under Supreme Court
Rule 16 on the grounds: (1) that this
appeal does not meet the requirements
of Title 28, United States Code, Section
1257(2) as alleged by Appellants; (2)
that the federal question presented was

not previously raised; (3) that the question presented does not present a justiciable "case or controversy" under the United States Constitution, Article III, Section 2; (4) that the question is based on an erroneous interpretation of State law; and (5) that the appeal does not present a substantial federal question.

PREFACE

The following references will be used where no confusion would exist: the Board of Property Tax Appeals as the Board; the Salt River Project Agricultural Improvement and Power District, as the Project or Appellant; and the Department of Property Valuation as the Department.

STATEMENT OF FACTS

The Project is a quasi-governmental body. It pays voluntary contributions in lieu of property taxes based on actual tax rates and the valuation of its property. A.R.S. § 45-2202(A). The Project is entitled to contest contributions in the same manner as taxes may be contested under A.R.S., Title 42, which contains the general provisions relating to taxation. Hereafter, contributions shall be referred to as taxes to avoid confusion.

The Project appealed to the Board from the valuation placed on its properties for purposes of property taxation. The Board decreased the valuation. Pursuant to A.R.S. §§ 42-123(B) and 42-151, the Department appealed from the lower assessment to the Superior Court.

Upon a motion for summary judgment, the Superior Court entered judgment for the Project on the grounds: (1) there was no competent evidence to rebut the presumption of validity of the Board's decision and (2) the procedure barring the Project from raising constitutional defenses was unconstitutional. The Department appealed. The Court of Appeals reversed on both grounds and remanded for trial. The court held that limiting the issue to valuation was not a denial of due process where alternative remedies are available.

Upon a petition for review the Supreme Court issued an opinion correcting dictum of the Court of Appeals to indicate that all issues could be raised in the alternative proceeding under A.R.S. § 42-204.

INTRODUCTION

Appellant's appeal to this Court is improper on three procedural grounds: (1) the appeal does not present a justiciable controversy (Appellant is not harmed); (2) the issue was not previously raised in the Arizona Courts as such and (3) the decision of the Arizona Supreme Court reversing the summary judgment of the Superior Court and remanding for a new trial is not a final judgment within the meaning of 28 U.S.C.A. § 1257(2).

In addition, Appellant's arguments are based on an incorrect statement of Arizona law. Even so, Appellant's arguments lack merit.

A. THIS COURT IS WITHOUT JURISDICTION SINCE APPELLANT IS ATTEMPTING TO APPEAL FROM A JUDGMENT WHICH IS NOT A FINAL JUDGMENT OF THE ARIZONA COURTS.

Appellant relies on Title 28, United States Code, Section 1257(2)

as the basis for jurisdiction in this court. That section states in pertinent part:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court, as follows:

. . .

(2) By appeal, where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Thus, a "final judgment" is jurisdictional to an appeal to this Court.

In the instant case, the Superior Court (trial court) granted a motion for summary judgment on the grounds that (1) there was no fact dispute as to value of Appellant's property and (2) the procedure for contesting tax assessments was unconstitutional.

The Arizona Court of Appeals reversed on both contentions and remanded the case "for further proceedings consistent with this opinion". The Arizona Supreme Court took jurisdiction to correct a misstatement by the Court of Appeals, then "remanded for further consideration as directed by the Court of Appeals". In the absence of this appeal or other procedural steps, the case would be set for trial. The sole issues would be classification or valuation of Appellant's property.

A number of cases in this court have held that generally a cause remanded for trial of the issues was not a "final judgment" of the State Courts, thus not subject to jurisdiction of this Court. Winn's Heirs v. Jackson, 12 Wheat. 135 (1827);

Haseltine v. Central Bank of

Springfield, 183 U.S. 130 (1901). In

Cox Broadcasting v. Cohn, 420 U.S.

469 (1975) a complete analysis of the exceptions to this rule was discussed. The first three exceptions are of no application in this case. The first exception is that the outcome at trial is preordained; the second, the Federal question is a totally separate issue; and third, Appellant would later be legally precluded from testing the Federal issue. None of these exceptions apply. The fourth exception could arguably be applied here; it was stated as:

Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail

on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.
420 U.S. at 482-483.

The important factors for invoking this exception are (1) a decision of this Court would preclude further litigation, (2) the State Court decision has doubtful merit and (3) an important federal policy would be

Seriously eroded. 420 U.S. at 486.

First, it is possible that a decision adverse to the State could preclude further litigation. However, a variety of other results from such a decision are possible. For example, the Court could remand to the Arizona Supreme Court for reconsideration of the State decision in light of the decision on the Constitutional issue.

Second, the decision of the Arizona appellate courts is correct. As will be elaborated below, the Appellant's argument is without merit. See Section E.

Third, there is no federal policy of the magnitude set forth in prior decisions in this category. Those cases involved issues of chilling effects on First Amendment

rights, see Cox Broadcasting v. Cohn, supra; Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Village Voice, Inc. v. Rinaldi, 423 U.S. 883 (1975); cert. denied, J. Douglas dissenting, or a federal statutory policy. See Construction Laborers v. Curry, 371 U.S. 542 (1963); Mercantile National Bank v. Langdean, 371 U.S. 555 (1963).

We urge the Court to dismiss this appeal on jurisdictional grounds.

B. APPELLANT HAS NOT ARGUED NOR HAVE THE ARIZONA COURTS DECIDED THE PRECISE QUESTION PRESENTED BY APPELLANT.

Appellant states the issue as whether conditioning the appellant's conceded Fourteenth Amendment right to present its case (that the State Department of Property Valuation has discriminated against it in valuing

its property) on the payment of a tax that the highest State authority to consider the matter (the Board of Property Tax Appeals) has held is not due and owing, violates the appellant's constitutional rights of due process and equal protection. This issue is different from the issue raised in the Arizona Courts. An issue raised for the first time on appeal to this Court will not be considered by this Court. See McGoldrick v. Campagnie Generale Transatlantique, 309 U.S. 430 (1940).

In its brief to the Arizona Court of Appeals, the Project argued that "limiting the issue upon which one can be heard is denial of due process of law". In its arguments in support of a motion for rehearing before the Arizona Court of Appeals the Project

argued that "any appellate remedy which does not contain the factor of equalization [unconstitutional discrimination] as an integral part of its mechanism is fatally defective". While the issue is not clearly stated in the lower courts, we believe it is fairly construed as whether the bar to raising constitutional defenses in an appeal of property tax valuation is a denial of due process. A sub-issue is whether an alternative remedy cures the defect.

These issues are materially different from the issue presented to this Court. The issue here is a second level sub-issue, i.e., whether the requirement of payment of taxes as a condition precedent to raising the issue results in an alternative remedy that is constitutionally

inadequate. If the issue presented here was not apparent until after the decision of the Court of Appeals, Appellant could have raised it on a motion for rehearing before either the Court of Appeals or the Supreme Court.

We interpret Appellant's Jurisdictional Statement to state that it could now pay some amount of tax in addition to the amounts found due by the Board, then contest those amounts as unconstitutional under A.R.S. § 42-204. This is not an accurate statement of Arizona law. Appellant's most efficient remedy on the constitutional issue was a direct appeal to the courts, but the Appellant elected to appeal to the Board of Tax Appeals which only has a limited jurisdiction. Having made

that election, the Appellant cannot raise the discrimination issue in this valuation action. If it has paid its taxes under protest it can bring an action under A.R.S. § 42-204. The discrimination issue can then be litigated under A.R.S. § 42-204.

C. THIS COURT IS WITHOUT JURISDICTION SINCE THE QUESTION PRESENTED BY APPELLANT DOES NOT CONSTITUTE A "CASE OR CONTROVERSY".

This case does not in its present state constitute a "case or controversy" under United States Constitution, Article III, Section 2. Appellant indicates it is satisfied with the decision of the Board of Property Tax Appeals. The Board's decision is presumptively correct on appeal to Superior Court. A.R.S. § 42-152(B). The fact is that

Appellant is not required to pay or being threatened with payment of any amount with which it disagrees.

In Allbaugh v. U.S., 184 F.2d 109, 115, cert. den. 340 U.S. 905 (8th Cir. 1950), the United States brought an action as sovereign trustee for allotted Indian land for recovery of delinquent rentals from the lands. The rentals included taxes on the land. The lessee alleged that the taxes were unconstitutional. The taxes were not a lien on the property nor was payment demanded of the Indians. The Court stated that the issue was not ripe for testing since no injury was incurred. Similarly, Appellant has suffered no injury on account of discriminatory assessment nor is injury threatened.

We find it difficult to determine what issue Appellant intends to raise in any event.

As suggested above, if the Project has paid taxes under protest, it can commence an action under Section 204 alleging unconstitutional discrimination immediately. However, Appellant states it is satisfied with the result of the Board. Since the Board's determination was a fact-finding of the full cash value of Appellant's property, a contrary fact-finding by the Superior Court would not raise any of the usual questions of unconstitutional discrimination. Therefore Appellant has either met the jurisdictional requirements for an action under Section 204, i.e., timely payment of taxes under protest, and could commence an action immediately

or it is foreclosed.

D. APPELLANT'S APPEAL IS BASED
ON AN ERRONEOUS INTERPRE-
TATION OF ARIZONA LAW.

Appellant bases its argument on the premise that it might now pay some amount under protest in addition to the amount found due under the Board's ruling; then, sue for a refund alleging unconstitutional discrimination. Clearly, this procedure is not authorized under Arizona law.

The decision of the Court of Appeals infers that Appellant has made an election of remedies. It cannot now raise the constitutional issue since it chose to make an administrative appeal rather than a direct appeal to the Superior Court. Since the remedies are cumulative, the Appellant can, after payment of

taxes under protest, bring an action under A.R.S. § 42-204 raising the constitutional issue.

E. APPELLANT'S ARGUMENT DOES NOT
PRESENT A SUBSTANTIAL FEDERAL
QUESTION.

Finally, Appellant's claim, aside from all other objections, has no merit.

Appellant misconstrues the decision of the Arizona Courts. The courts held that the Project could have raised its constitutional objections had it elected to proceed by a "direct appeal" under A.R.S. § 42-151; then, after payment of taxes under protest, it could have sued for refund under § 42-204 raising the constitutional issue. In the alternative, the Project could have simply paid the taxes under protest and raised both issues in a

refund proceeding under A.R.S.

§ 42-204. It has always clearly been the law that the first procedure was available. The Supreme Court in its decision in this matter indicated the latter procedure was available.

The Arizona Court of Appeals dealt with the issues raised by Appellant at pages B-12 through B-13 and B-17 through B-18. Jurisdictional Statement. We will not repeat that analysis.

Finally, Appellant suggests this case is analogous to the constitutionality of a poll tax. Appellant cites Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) for the proposition that there is a right to vote in state elections guaranteed by the United States Constitution. In fact the case is decided on Equal

Protection grounds. The court expressly avoided the other issue. Appellant then cites San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973) for the proposition that a right guaranteed by the Constitution not be conditioned on payment of a tax. We find no suggestion of that proposition in Rodriguez, supra. Finally, Appellant ignores the fundamental function of taxes in government. Taxes are necessary for the operation of government. Without the ability to operate on internal debt, local governments must be able to fairly predict tax collections. Consequently, a value set as of a given date must be used for purposes of tax collections in the same year, since the value is used to determine the tax rate.

Conditioning a suit for refund on payment of the tax is necessary for the stability of local government and there is no constitutional impediment to such a requirement.
Cf. Union Pacific R.R. v. Dodge County,
 98 U.S. 541 (1879).

CONCLUSION

On the basis of the points and authorities discussed herein, the appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 1977, three copies of the MOTION TO DISMISS AND BRIEF IN SUPPORT OF MOTION were mailed postage prepaid to

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I further certify that all parties required to be served have been served.

BRUCE E. BABBITT
 Attorney General

/s/ James D. Winter
 JAMES D. WINTER

Subscribed and sworn to before me
 this 5th day of April, 1977.

/s/ Leone Hohman
 Notary Public

My Commission expires:

March 19, 1980